IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1586

ERNEST A. WINKLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUTHORITIES

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Ernest A. Winkle, by and through his undersigned attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A., infra,) is reported at 587 F.2d 2094. The court's order denying Petitioner's Petition for Rehearing was entered February 8, 1979. (App. B).

JURISDICTION

The judgment and opinion of the court of appeals was entered on January 11, 1979. The court of appeals denied Petitioner's Motion for a Rehearing on February 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 103, Federal Rules of Evidence, a formal offer of proof is required before a reviewing court may find error in the exclusion of admissible evidence, where the substance of that evidence is apparent from the context in which it is offered.

2. Whether the government may present evidence of an alleged "similar transaction" without providing sufficient proof that the defendant was involved, that the "similar transaction" constituted or resulted in an offense, or that the "similar transaction" involved an element related or probative of a material issue of law or fact in the charge and trial of the current alleged offense.

3. Whether, when evidence of a jury impropriety is shown, the trial court must diligently investigate it to the extent of polling all the jurors if necessary; whether the reviewing court may determine, without a finding by the trial court and without requiring the government to bear its burden of proof, that no impropriety took place or that no prejudice resulted if an impropriety did, indeed, take place.

STATUTES INVOLVED

Sections 371 and 1001 of Title 18, United States Code; Sections 1395nn, 1395x(v)(1)(A), and 1395y(a)(1) of Title 42, United States Code; and Title XVIII of the Social Security Act, as amended, (42 U.S.C. §§ 1801-1879).

The Sixth Amendment to the United States Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his Defense."

STATEMENT

Ernest A. Winkle was charged in a twenty-two point Indictment with various violations of federal law (R. 1). The first count charged Winkle and others with a conspiracy to defraud the United States by causing the payment of medicare benefits under the provisions of the Social Security Act to be made in amounts greater than the amounts which were properly payable.

Counts II through XXII charged substantive violations of Section 2 and 1001, Title 18, United States Code.

Defendant, Leonarda Paturso Winkle, obtained a severance and thereafter was never prosecuted. Another Defendant, Colmar, acting in accordance with a plea agreement giving him probation, entered a plea to some of the charges and did not proceed to trial. Defendant, Joseph N. DiStefano, proceeded to trial with Winkle.

The jury was unable to reach an unanimous verdict on the conspiracy count, and that count was ultimately dismissed on the motion of the government. However, Defendant, Winkle was convicted on Counts II through XX. (R. 67). Winkle was thereafter sentenced to a term of imprisonment of 5 years on Counts II through XX, with the sentence imposed on Counts III through XX, to be served concurrently with the sentence imposed on Count II. (R. 68).

Winkle appealed the conviction and sentence to the Court of Appeals for the Fifth Circuit, which, on January 11, 1979, upheld the trial court. (R. App. A). Winkle's Petition for a rehearing was denied on February 8, 1979. (App. B).

The facts of the case pertinent to this Petition are as follows:

The Petitioner and one Dr. Feegle were in the business of testing residents of various nursing homes in Pinellas County

and Hillsborough County, Florida, for sundry medical problems and then evaluating the tests. For the services, Petitioner and Feegle submitted payment requests to Medicare, which reviewed the requests and made the payments.

At trial, the government presented several witnesses who claimed they were chiropractors. These witnesses testified that Petitioner and Dr. Feegle paid them fees for referring patients and performing certain services that were ultimately billed to Medicare. The government also presented Medicare representatives who testified that the referral fees paid to the chiropractors were not authorized by the rules and regulations of Medicare. The government offered additional witnesses who testified that some of the testing performed was not medically necessary.

Finally, the government presented some witnesses who claimed that Petitioner knew the chiropractors were being paid referral fees in violation of the medicare rules and regulations and that he knew that some of the services rendered and tests performed were not medically necessary.

Petitioner, through his testimony and other witnesses, disputed each and every contention of the government, and put at issue the credibility of the key prosecution witnesses.

Near the end of its case, the government presented two witnesses to testify about purported "similar transactions." One Dr. Braell testified that, in 1972, he met with someone who identified himself as a Mr. Winkle, not otherwise identified, who presented him with some requests for payments of medicare benefits for execution. The doctor testified he executed several of the documents, but could not execute one since a particular patient was not his patient. He further testified that he later received a copy of all the requests for payment, including the one he did not sign, from a representative of the Genesea Valley Medical Care, a Blue Cross organization. He testified that the document he had not signed nevertheless contained his purported signature, although it was misspelled. The documents had apparently been submitted to the Blue Cross organization by a company known as Integrated Medical X-ray Services, Limited, and on a request for payment submitted by that company appeared the name Ernest A. Winkle. All of the aforesaid occurred in April, 1972. (R. Vol. 3A, pp. 488-1530; Vol. 1B, pp. 113-123).

No testimony was presented that as a matter of fact the request for medicare payment had ever been presented to any agency or group acting for, or in behalf of, the United States of America under the medicare program. Neither was there testimony that the request for payment was, as a matter of fact, honored or even processed, or that the services for which the charge was made was either rendered or not rendered or medically necessary or not medically necessary, or a charge in excess of the prevailing rate.

As a part of its "similar transaction evidence" presentation, the government then called William Zablocki, who stated he was an x-ray technician employed by a company owned by the Defendant from September, 1971, through January or early February, 1972. Zablocki identified the company as Integrated Medical X-ray Services, Limited, and another company by the name of Integrated Health Services and Integrated Health Systems. He stated the companies operated in Syracuse, New York, and provided various tests, therapy and laboratory work. (R. Vol. 1B pp. 126-134). Parenthetically, the Defendant denied that he ever met, or had any dealings with, Dr. Braell.

The Defendant objected to the introduction of the above evidence and moved for a mistrial. The court denied the objections and motions, and, over objection, gave the jury a "similar transaction instruction" at the conclusion of the testimony. (R. Vol. 1B pp. 130-135).

In an attempt to establish Winkle's active participation in the alleged conspiracy and fraud, the government offered the testimony of a Mr. Rackstein, and one Mr. Talty. The court allowed those witnesses to testify fully and completely regarding the dealings and conversations with the Defendant. When

the Defendant attempted to impeach those witnesses by testifying as to the same dealings and conversations, however, the court would not allow him to testify as to what those persons said on the basis that the testimony was hearsay and did not constitute an exception to the hearsay rule that permitted its submission. (R. Vol. 1 pp. 773-778; Vol. 2B, pp. 973-982, 983-986) (DA-652-657, 2027-2035, 2037-2040).

The Defendant was precluded from testifying as to the entire conversation he had with Mr. Talty, and the latter sale of the laboratory program to chiropractors, on the basis that what Mr. Talty said was hearsay. This ruling came irrespective of the fact that Talty had previously testified about the conversation, and the Defendant sought to impeach Mr. Talty by presenting his version. (R. Vol. 2B, 995-1000) (DA-2049-2054).

The same type of hearsay objections and exclusions of testimony persisted throughout the presentation of the Defendant's testimony. The Defendant was never permitted to testify as to what he was told, despite the fact that during the course of the government's case, the witnesses testified as to the entirety of the conversation, and that the Defendant's version thereof was inconsistent with what the government witnesses had testified to. (R. Vol. 2B, pp. 1042, 1044; 1072-1074; 932-942; 944-946; 1010-1023; 1081-1090; Vol. 3B, pp. 1132-1142) (R. 80-84; 139-141; 773-778; 197; 1260-1292) (DA 2097, 2099, 2127-2129. 1985-1996; 1998-2000, 2064-2077, 2136-2145, 2186-2196, 34-38, 93-95, 652-657, 151, 976-1008).

The evening the jury returned the verdict against the Defendant, counsel for the Defendant, Mr. Dempsey, learned that prejudicial extraneous material had come to the attention of the jurors which adversely affected the Defendant herein. The undersigned attorney brought the matters to the attention of the court. As a consequence, the foreman of the jury was called before the court as was Mr. Dempsey and one other juror. Dempsey and the foreman testified that one or more of the jurors stated, during the course of their deliberation, that they learned from a newspaper article that a co-defendant, Mr. Colmar, had pled guilty to some of the charges herein, and, therefore, Defendant, Winkle was obviously guilty. The court inquired of only one other juror in order to determine whether or not she was the source of information and despite the urging of the undersigned attorney, refused to inquire of any other jurors. At the conclusion of the aforesaid proceedings, the court denied the Defendant's Motion for a New Trial. (R. 1, 71, 72, 58, 67, 63) (18a, 18b, 19, 20, 21, 30-33, 35, 4-8, 44-48) (Vol. 3, 1, 2) (DA 807, 808, 809, 810, 811, 820-823, 825, 793-797, 835-838).

REASONS FOR GRANTING THE WRIT

As reflected in the preceding statement, there are three major areas of contention for which Petitioner seeks review by this Court. The first involves the court's refusal to allow Petitioner to testify as to conversations previously testified to by government witnesses in order to impeach their testimony. The Court of Appeals below unanimously agreed with the Petitioner that such testimony was admissible as an exception to the hearsay rule. That court, however, failed to find error for lack of Petitioner's trial counsel to make a formal offer of proof to the trial judge. The central question arises, therefore, as to whether a formal offer of proof is necessary if the substance of the evidence was apparent from the context within which the questions were asked.

The second general area Petitioner proposes for consideration involves "similar transaction evidence." Due to the often prejudicial and inflammatory nature of such evidence, Petitioner submits that it should be subject to strict qualifications and limitations before it can be admitted. A number of questions, therefore, arise:

> How closely in time must the alleged similar transaction be to the one charged at trial?
>
> How closely related must the elements of the alleged similar transaction be to the elements of the current charge?

How positive must the proof of the alleged similar transaction be?

What is the burden of the government to show that the current Defendant was, indeed, involved in the alleged similar transaction?

Indeed, what is a "similar transaction?".

The final area of analysis involved in this case is that of jury impropriety. When moving for a new trial based upon jury impropriety, what burden does the Defendant bear before the court will inquire as to impropriety or conclude that it, indeed, took place? Once the Defendant has satisfied the burden, to what extent must the court go in investigating it?

Petitioner submits these are important questions bearing heavily upon the right of a Defendant to have a fair trial in which he can present an adequate defense before an impartial jury.

1. As previously pointed out the Petitioner at his trial attempted to testify as to conversations previously testified to by government witnesses. Said conversations were important to the government's attempts to show participation and knowledge of Petitioner of the acts charged in the Indictment. Despite the fact that the government witnesses had been allowed to testify fully as to the conversations, the trial court refused to allow Petitioner to impeach those witnesses by testifying as to their parts of the conversations.

The Fifth Circuit Court of Appeals, as to Petitioner's contention that the evidence was admissible as proper impeachment, stated:

> "The legal proposition on which the assertion is based is correct; impeachment to demonstrate the untruth of a witness's testimony is not excludable as hearsay, because it is not offered primarily to prove the truth of the matter asserted, but to contradict the prior testimony."

The Court went on, however, to state that no error had been shown because no offer of proof as to the contents of the testimony had been made.

Rule 103(a)(2) of the Federal Rules of Evidence provides that error may not be based on a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent on the context within which questions were asked." As pointed out by the Circuit Court below, the Fifth Circuit has taken a rather restrictive position in this regard.

> "We do not require a formal proffer; but the proponent of excluded evidence must show in some fashion the substance of his proposed testimony. The Defendant here gave no indication concerning what he would have testified or the manner in which his contradiction or denial of what had already been adduced would have been admissible or helpful. While the Defendant was given the opportunity to do so, outside the presence of the jury, his counsel merely stated that Winkle would testify as to his version of the conversations he had with Rackstein, Talty, McCann, Norton, Morehead, and Mrs. Winkle. This was not sufficient to make known to the Court the *substance* of the evidence."
> (Emphasis by the Court)

The Court pointed out that the Fifth Circuit "will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial. *Mills v. Levy*, (5 Cir. 1976) 537 F.2d 1331, 1333; *United States v. Muncy*, (5 Cir. 1976) 526 F.2d 1261, 1263). This, of course, ignores the fact that the Court had *already* considered the propriety of the exclusion by virtue of its statement that the evidence was, indeed, admissible as impeachment. Further, the position of the Fifth Circuit appears to ignore entirely the language of Rule 103(a)(2), Federal Rule of Evidence, to the effect that error can be found if the substance of the evidence was apparent from the context within which the questions were asked.

Clearly, and as pointed out by the court below in its opin-

ion, other circuits do not ignore the plain language of the rule. The case of *Charter v. Chleborad*, (8 Cir. 1977) 551 F.2d 246, is indicative. There, Plaintiff sought to cross-examine a witness as to matters that would show a possible bias of the witness. Defendant objected and the court refused to allow further questioning on the subject. The Defendant argued on appeal that the trial court could not be reversed on that account because the Plaintiff was required to make a formal offer of proof. The Eighth Circuit Court of Appeals disagreed, citing Rule 103(a)(2) of the Federal Rules of Evidence and stating:

> "However, it is clear from the transcript, particularly the conversation between counsel out of the hearing of the jury, that the court was aware of the general nature of the evidence to be offered." 551 F.2d (246, 249).

That conversation was set forth in Footnote 1 of the Court's Opinion, as follows:

> "PLAINTIFF'S COUNSEL: We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation.
>
> THE COURT: But now I don't want insurance to enter this case at all. We have been at this over a week.
>
> PLAINTIFF'S COUNSEL: All right. I am not going into that. I just wanted to show —
>
> DEFENDANT'S COUNSEL: He has already.
>
> THE COURT: Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will. Do you understand?
>
> PLAINTIFF'S COUNSEL: I understand, your Honor." 551 F.2d 246, 248

Thus, the Eighth Circuit in the *Charter* case provided a definition of the term "apparent from the context," that definition being that the court must be aware of the general nature of the evidence. Here, as pointed out by the court below, Petitioner's trial counsel informed the court that Petitioner would testify as to *his version* of the conversations that he had with the government witnesses.

Clearly, in light of the damaging recollections of the conversation as presented by the government witnesses, Petitioner's version of the conversations would differ. Surely, the context in which Petitioner was asked about the conversations indicated that his recollection of them would be different from that of the government witnesses. This is especially apparent from the bench conference held after the government objected to the testimony, in which Petitioner's trial counsel urged that Petitioner had a right to confront the witnesses against him. (R. Vol. 2B pp. 976-982) (DA 2030-2036).

> "MR. DEMPSEY: All right relate the conversation that you had at that time, please.
>
> MR. TROMBLEY: Objection, your honor, to any hearsay conversation.
>
> MR. DEMPSEY: Your Honor, I would like to be heard on this matter.
>
> THE COURT: Come forward.
>
> (At this point a bench conference was had between the Court and counsel for the respective parties, outside the hearing of the jury as follows)
>
> MR. DEMPSEY: Your Honor, I believe that this is admissible to the fundamental deprivation of his right of confrontation of the constitutional rights that by far supersede and surpasses any rule of evidence, and I think it just absolute error not to permit him to —
>
> THE COURT: Isn't that an interesting — It is not one of the exceptions under the rules of evidence. As I recall, they knew about that when they prepared the Rules of Evidence.
>
> Here is the point. The right to confront is — you had the right to confront and you did confront Dr. McCann. You

had the right to confront. You did confront Mr. Rackstein about what he said. The jury is entitled to hear what each of them say they said, and that is the way the jury gets the picture.

Now, if the jury has to hear what each of them say somebody said, then, you see, that is not the point.

MR. DEMPSEY: The government witnesses properly related their conversations that they recall occurring in the presence of my client, and that was proper.

THE COURT: Because, you see — well, because, you see he is able to tell you and you are then able to tell — you are then able to tell—you are then able to cross-examine this man or you were able to cross-examine them about it because he was present.

MR. DEMPSEY: That entitled them to get in evidence against my client?

THE COURT: Well, because it wasn't hearsay.

MR. DEMPSEY: Now, if it wasn't hearsay then, it's not hearsay now."

This exchange is indicative of similar exchanges between Petitioner's counsel and the trial Court throughout the trial. These colloquoys, perhaps, are what were referred to when Judge Roney, in dissent below, stated that "under the circumstances permitted by the trial Court" he believed that a sufficient proffer was made. Judge Roney went on to state:

"Winkle stated that he wanted to testify as to his recollection of the conversations previously testified to by the government witnesses. What his recollection might be is irrelevant to the question of admissibility. He had a right to testify as to these conversations, even if his recollection was essentially the same as the testimony of the government witnesses, *which it apparently was not*. The error severely curtailed the ability of the Defendant to present his testimony which the jury was entitled to hear. In my judgment, the record of the trial does not support a decision that the error was harmless beyond a reasonable doubt." 587 F.2d 2094, 2106 (emphasis added)

Thus, to at least one of the Circuit Court panel, it was apparent from the context what Petitioner's testimony would have been. The circumstances included the fact that the government had presented damaging testimony as to certain conversations; the Defendant then sought to present his version of those conversations; the government objected; Defendant's counsel argued that Defendant had a right to testify to those conversations in order to confront, or impeach, witnesses against him. Clearly, Defendant's version of the conversations would have differed from the versions testified to by the government witnesses. Otherwise, his testimony would have been an exercise in futility. Just as clearly, the government believed the same thing. Otherwise it would not have pushed its objection.

Given the Fifth Circuit's historical position requiring a proffer, why then was no proffer made? One possibility is that the context in which the testimony would have been given was so apparent to defense counsel that he felt no proffer was necessary. His thoughts in this regard, of course, are not reflected in the record. The record does reflect, however, numerous exchanges in which the trial Court constantly interrupts defense counsel's attempts to convince him as to the admissibility of the evidence. The exchange recorded above is a good example of what the Petitioner submits were the "circumstances permitted by the trial Court" referred to by Judge Roney in dissent.

The Fifth Circuit's characterization of the exclusion of Petitioner's proposed testimony as harmless conflicts with the Court's own version of the government witnesses' testimony set forth in footnote 11 of the opinion. Witness Rackstein testified regarding Winkle's dealing with chiropracters, as part of the government attempts to prove Winkle was illegally collecting payment for services performed by chiropracters. Winkle, of course, would have testified to aspects of the conversation which would show that he was surprised to learn that the association to which he had been invited to speak was an association of chiropracters. Witness Talty testified to the conversation in which Winkle proportedly told him to make illegal double payments to doctors for medicare patients. Winkle's version of

the conversation, of course, would have shown that he gave no such instructions. Witness McCann testified as to a conversation in which Winkle gave him a check. Winkle's testimony as to that conversation, of course, would have shown that the circumstances of that conversation were not as presented by the government through McCann's testimony. Clearly, the testimony of the government witnesses was damaging to the Petitioner.

Petitioner submits that the government was allowed to present testimony fully describing conversations that were highly damaging to him. The refusal of the trial Court to allow Petitioner to testify as to whether the conversations took place, what was said during the conversations, or what the circumstances were, effectively prohibited Petitioner from impeaching the credibility of the witnesses against him. There is no doubt that the testimony was relevant, in that the conversations were originally offered by the government to prove elements of its charges against the Petitioner. The credibility of that evidence was thereby placed at issue, and it is fundamental that the Petitioner had a right to challenge it.

In *Lopez v. United States*, 373 U.S. 427, 83 Sup. Ct. 1381 (1963), this Court stated:

> "The function of a criminal trial is to seek out and determine the truth or falsity of charges brought against the Defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant and competent evidence be admissible unless the manner in which it has been obtained — for example, by violating some statute or rule of procedure — compels the formulation of the rule excluding its introduction into a federal court."

In *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973), the Court, in discussing the admissibility of evidence, stated that:

> "The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the tryers of fact, thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probitive value are admissible and all facts having rational probitive value are admissible unless some specific policy forbids. . . evidence which has any tendency and reason to prove any material fact has rational probitive value."

In *United States v. 1,129.75 Acres of Land, etc.*, 473 F.2d 996 (8th Cir. 1973), the Court stated:

> "The law of evidence in the federal court favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it."

Petitioner submits that the testimony he sought to give was highly relevant to his defense in that it would have brought into question the credibility of important government witnesses against him. The Court's error in this regard was harmful, denied him his constitutional right to a fair trial and to confront witnesses against him, and the Petitioner is therefore entitled to a reversal on this account.

2. Rule 404(b), Federal Rules of Evidence states:

> "(b) Other crimes, wrongs or acts. — Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

On the next to last day of its presentation of its case, the government out of the presence of the jury presented argument regarding the admissibility of what it considered to be testimony relating to prior similar transactions of Petitioner, Winkle (R. Vol. 3A pp. 1488-1530). The government sought to present testimony by a Mr. Zablocki and Dr. Braell, who were

going to testify as to some purported transactions that occurred in 1972 allegedly involving Petitioner, Winkle. Petitioner, through counsel, submitted that the evidence did not satisfy the requirements of Rule 404(b), Federal Rules of Evidence, or the requirements set forth in case law. The Court nevertheless determined that the evidence was admissible, overruled counsel's objections, and directed that the objections would carry forward during the course of a presentation of the evidence without the necessity of specific objections thereto being made in the presence of the jury.

The government presented Dr. Braell (R. Vol. 1B pp. 113-123) (DA 1162-1172), who testified that he was a medical doctor who practiced internal medicine in Elmira, New York, in April, 1972. He claimed that at that time someone who was identified to him as "Mr. Winkle" presented several documents to him for his signature, that he signed several of them, but he declined to sign one particular document that was a requisition slip to perform an X-ray survey on a patient that was not his. These documents purportedly were submitted for medicare payment. At no time was the doctor asked by the government to identify Defendant Winkle as the person with whom he had these dealings, and, as a matter of fact, on cross-examination the doctor testified that he could not identify the Defendant as the "Mr. Winkle," he had dealt with.

The doctor further testified that he was later presented the documents by a representative of Genesea Valley Medical Care, a Blue Cross organization, at which time he noted that his purported signature was on the document he had refused to sign. Dr. Braell absolutely denied that he had signed that form and noted that his name was misspelled. (R. Vol. 1B pp. 117) (DA 1166). The doctor further testified that the name on a particular page requesting medicare payment for two patients that were not his was Ernest A. Winkle.

No one testified that, as a matter of fact, the request for medicare payment had ever been presented to any agency or group acting for or in behalf of the United States of America

under the medicare program, that any request for payments as a matter of fact had been honored or even processed, or that the services as a matter of fact were never performed or not medically necessary.

The clear prejudicial implication from the testimony was that the Defendant, Ernest A. Winkle, was involved in this request for payment, and that he either, directly or indirectly, caused the doctor's forged signature to appear on the request for payment. It is noted that the doctor testified the name of the company providing the forms for his signature was Integrated Medical X-ray Services, Ltd.

The government then presented the testimony of William Zablocki who identified himself as an X-ray technician, residing in New York. Zablocki said that from August, 1971, through January or February, 1972, he worked for the Defendant, Ernest A. Winkle and claimed Winkle was the president/owner of Integrated Medical X-ray Services, which company also operated under the name of Integrated Health Services and Integrated Health Systems. The company, Zablocki said, operated in Syracuse, New York, and provided various types of tests and therapy and laboratory work. At the conclusion of this witness' testimony, counsel for the Defendant Winkle moved for a mistrial and moved to strike the witness' testimony, which motions were denied by the Court. (R-Vol. 1D, DP-126-134) (DA 1175-1183).

An aspect of the colloquoy between the Court and counsel is pertinent, and therefore, hereinafter set forth:

> "MR. DEMPSEY: No, I understand you to say the government had to establish that Mr. Winkle was affiliated with the provider at the time these forms were submitted.
>
> THE COURT: It wasn't my intention and it is my opinion that it is not required that they prove specifically the time this thing was given that he was connected with them. I think it is circumstantial evidence. The jury can assume maybe it was, but in the absence of anything else, have you

asked him whether he knew as a matter of fact Mr. Winkle was still there when he left or did he stay in the same community or can he testify about that?

MR. TROMBLEY: I don't know."

The Court advised counsel that he intended to give the "similar transaction" instruction at that time. An objection was made, counsel contending in no way was this a similar transaction and that by giving this instruction at this particular time, it would buttress and support the government's contention that this was a similar transaction to that charge in the Indictment for the jury's consideration. The Court overruled the objection and gave the similar transaction instruction (R-Vol. 1D pp 130-135) (DA 1179-1184).

Petitioner submits that the admission in evidence of this highly prejudicial testimony violated every principle of law and case that has addressed itself to the proposition. In failing to exclude the evidence, the Court allowed the government to blatantly accuse Petitioner of another, separate, crime without even providing proof that the Defendant was involved in that crime. One witness states that a man, whom he could not identify as the Defendant, approached him with some forms, some of which he signed. At a later time, those forms were presented to him with his purportedly forged signature on one of the forms he had refused to sign. There was no indication, whatsoever, that the Defendant was involved in that transaction other than the fact that his name appeared on one of the forms. Indeed, there was no evidence that a crime was committed similar to the crimes charged in the Indictment in the current case. No evidence was ever offered showing that the forms were ever submitted to the United States government for payment, proper or otherwise. Another witness testified that he worked for the company that had purportedly provided the forms, but quit his employment with that company several months before the transaction described by the first witness.

In the case of *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974), Defendant was charged and convicted with

willfully assaulting a federal agent while in the performance of his duties. At the trial, the government introduced evidence of three previous misdemeanor assault convictions of the Defendant. The Fifth Circuit Court of Appeals reversed and remanded holding that evidence of another crime unconnected with the one on trial is generally inadmissible. Although there are exceptions to this general rule, the Fifth Circuit declared that four essential elements must be present for the exception to apply, namely:

1. Proof of the prior similar offense must be plain, clear and convincing;

2. The offense must not be too remote in point of time to the offense for which the Defendant had been indicted;

3. The element of the prior crime for which there exists an exception must be a material issue in the case in hand;

4. There must be a substantial need for the probitive value of the evidence provided for by the prior crime or offense.

Petitioner submits that none of those elements were satisfied by the prosecution in this case and the admission in evidence of this prejudical testimony was not supported in law or fact.

In *United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974), the Fifth Circuit found reversable error in the admission of a proported similar transaction and held:

"We reject the government theory, not only out of respect for the law of this circuit, but also out of a recognition of the danger enunciated by Dean McCormick, that, 'if the Judges, trial and appellate, content themselves with merely determining whether the particular evidence of the crimes does or does not fit in one of the approved cases, they may lose site of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.' See McCormick, Evidence section 190 at 453 (2nd edition 1954). Rather than undertake an exercise in 'pidgeon holing', as

> Dean McCormick describes it, this Court has adopted a more difficult, but more enlightened, balancing approach. Assuming of course, that the evidence of other crimes is clear and convincing, we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence as proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well." 492 F.2d 1141, 1150.

The Fifth Circuit in *United States v. Broadway*, 477 F.2d 991, (5th Cir. 1973), held that in order to disregard the general rule of inadmissibility of another crime, the other crime must be closely related "in both time and nature of the crime charged." The Court in Broadway noted that it adopted the Eighth Circuit's position that for "similar crime" evidence to be admissible, it must be plain, clear and conclusive, and not evidence of a vague and uncertain character. The Court went on to hold:

> "Directing our attention once more to the facts here and applying the 'plain, clear and conclusive' test, the fatal flaw in the evidence below becomes apparent proof of like crimes would consist of proof of transporting similar falsely made or forged securities in intrastate commerce, or causing them to be so transported by placing them in the flow of commerce. This was precisely what the government was not able to prove. Since it proved at most that George Broadway placed his true name endorsement on such other securities. Without proof of encashment or passing by Broadway the offenses were no longer similar, assuming that some offense was proved by proof of Broadway's endorsement in the two additional money orders. Proof of such offense, whatever it was, was not proof of a violation of section 2314 or of a similar offense. The essential ingredient of transportation or causing to be transported was lacking . . . it was prejudicial error requiring reversal of the conviction, to permit the jury to receive this evidence."

The court of appeals below justified its approval of the "similar transaction evidence" by citing *United States v. Beechum*, 5th Cir. 1978, 582 F.2d 898 (*en banc*). In that case, involving the prosecution of a letter carrier for unlawfully possessing property he knew to be stolen from the mails, the Fifth Circuit engaged in a rather exhaustive discussion of similar transaction evidence and its requirements. Before evidence of an extrinsic offense may be admitted, the Court said, it must undergo a two step test:

> "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the Defendant's character. Second, the offense must possess probitive value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403." 582 F.2d 898, 911

The Court noted, however, that proof that the Defendant actually committed the similar offense is a basic element of its relevancy:

> "Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the Defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the government must offer proof demonstrating that the Defendant committed the offense. If the proof is insufficient, the Judge must exclude the evidence because it is irrelevant." 582 F.2d 898, 913

In the case at bar, the government's "proof" that Petitioner Winkle was involved in the proported similar transaction consisted of the following: Dr. Braell testified that a man claiming to be Ernest A. Winkle approached him with some forms. Dr. Braell could not identify Petitioner Winkle as that man. Later, he saw the forms again, with the name Ernest A. Winkle written on them. Witness Zablocki testified he was employed by the company that purportedly provided the forms to Dr. Braell. Zablocki, however, terminated his employment with the company several months before the forms were provided to Dr. Braell.

Petitioner submits the government's similar transaction evidence was extremely prejudicial and had little or no probitive value. The only witness who could possibly have linked the Petitioner with the purported similar transaction was unable to identify Petitioner as a participant in the alleged similar transaction. Further, no evidence was offered that the purported similar transaction ever resulted in an offense. No testimony was given to show that the forms were ever submitted to the United States government for payment, or that the government ever made payment on the claims. The "similar transaction" offered by the government failed in every way to satisfy the requirement of Rule 404 (b), Federal Rules of Evidence. Indeed, the evidence even failed to satisfy the Fifth Circuit's own requirement that proof of the prior similar offense must be "plain, clear and convincing." The only similarity between the alleged prior transaction and the alleged offenses at bar is that, in both instances, Medicare claim forms were involved; this, of course, was not a material issue in the case at bar.

3. The court below engaged in rather interesting reasoning in regard to the issue of jury impropriety in the case at bar. The court apparently had difficulty with the question for failure of the trial judge to make an adequate record, as reflected in footnote 19 of the Circuit Court's Opinion:

> "A more complete record could have been made on this point had the court interviewed the juror Shifler, who was implicated by virtue of Winkle's lawyer's recollection."

This, of course, was precisely one of the points on appeal raised by Petitioner citing the court's failure to interview or allow to be interviewed all but two jurors even though others had been implicated.

The Opinion below contains other inconsistencies that are both puzzling and detrimental to Petitioner and others in a like position. First, the court correctly notes "thus, an adequate demonstration of extrinsic influence upon the jury overcomes the presumption of jury impartiality; it shifts the burden to the

government to demonstrate that the influence in question was not, in fact, prejudicial."

Later in the Opinion, due to the failure of the trial court to make a definite conclusion, the Circuit Court assumed that a jury breach occurred, but held that it "created no apparent prejudice" to the Petitioner. The court thus ignored its own language to the effect that, a jury breach having occurred, the government bore the burden of showing a lack of prejudice.

As stated by this court in *Remmer v. United States*, 74 Sup. Ct. 450, 347 U.S. 227 (1954):

> "In a criminal case, any private communication, contact or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties. The presumption is not conclusively, but the burden rests heavily upon the government to establish after notice to and hearing of the Defendant, that such contact with the juror was harmless to the Defendant. *Mattox v. United States*, 146 U.S. 140, 148-150, 13 Sup. Ct. 50, 52-53, 36 L.Ed. 917; *Wheaton v. United States*, 8th Cir. 88 F.2d 522, 527."

The Fifth Circuit Court of Appeals, itself, stated in *United States v. Howard*, 5th Cir. 1975, 506 F.2d 865:

> " 'The modern jury is conceived of as a institution that determines the merit of a case solely on the basis of the evidence developed before it in the adversary arena... accordingly, the courts have been continually sensitive to the jeopardy of the criminal defendant's sixth amendment rights posed by any jury exposure to facts collected outside of the trial.
>
> '...this danger to fair trials is most acute when facts which have not been tested by the trial process have been intentionally communicated directly to the jurors. Thus, for example, we held in *Paz v. United States*, 5th Cir. 1972, 462 F.2d 740, Cert. denied, *Jackson v. United States*, 414

U.S. 820, 84 Sup. Ct. 47, 34 L.Ed. 2nd, 52, that where books on drug problems and drug traffic were discovered to be in the jury room during the jury's deliberations in a narcotics case, the defendants are entitled to a new trial 'unless it (could) be said that there (no) reasonable possibility that the books affected the verdict.'...It is a fundamental principle that the government has the burden of establishing guilt solely on the basis of the evidence produced in the court room, and under circumstances assuring the accused of all the safeguards of a fair trial...

The evidentary inquiry before the District Court on remand must be limited to objective demonstration of extrinsic factual matters disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the District Court must then determine whether there was a reasonable possibility that the breach was prejudicial to the Defendant. (Citations omitted.) Again, the District Court is precluded from investigating the subjective effects of any breach on any jurors, whether such effect might be shown to affirm or negate the conclusion of factual prejudice. Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without the benefit of couch interview inspections. In this determination, prejudice will be assumed in the form of a rebuttal presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant."

The Fifth Circuit further held in *United States v. Fleetwood*, (5th Cir. 1976), 528 F.2d 528, that the admission in evidence of a co-defendant's plea of guilty to the same transaction and offense which the defendant was charged constituted prejudicial error, particularly where no limiting instruction was given to the jury. In *United States v. Hansen*, (5th Cir. 1977), 544 F.2d 778, the Fifth Circuit reversed a conviction of a defendant where the trial court advised the prospective jurors during the course of his voir dire examination that a co-defendant had entered a plea of guilty although he had further advised them that that plea of guilty was not in any way to be considered as evidence of guilt of the remaining defendant, or that they should infer guilt of the Defendant from the absence of the other defendant. The Court said:

"...the prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious. Neither fairness to those still on trial, nor the efficient, intelligent administration of criminal prosecution are served by this action."

Despite the fact that the courts have been extremely careful to protect the Sixth Amendment Right to a fair trial of a defendant when the possibility of jury impropriety has been raised, the court below cavalierly held that the alleged impropriety in this case was not prejudicial to Petitioner, stating:

"We fail to discern any genuine possibility of prejudice to the Defendant in his trial on the substantive counts from the jury's awareness, with respect to the conspiracy count that he may have associated with a criminally tainted individual."

Such reasoning is faulty for several reasons. First, the Court appears to be engaging in the same subjective analysis which it cautioned trial Judges against in its opinion in *United States v. Howard, supra*. The "psychological" assumption, of course, is that knowledge that a Defendant pleaded guilty to one count will not affect the jury's determination as to a Co-Defendant's guilt or innocence of another count. Petitioner submits that if such an assumption can be made and acted upon, it can also be assumed that the jurors can distinguish between defendants themselves. There would therefore be no need to shield the fact of a Co-Defendant's guilty plea from the jurors, nor would they need an instruction in that regard. There is no such assumption, of course, and the Courts have uniformly either instructed jurors not to infer guilt from a Co-Defendant's guilty plea, or, as in the case of the trial Court below have seen fit not to inform the jury of the guilty plea at all. Finally, the Court ignores, or attaches little significance to, the fact that both Defendants in the case below were charged with offenses arising out of the same transaction. Knowledge by jurors that Petitioner's Co-Defendant had pleaded guilty to one of the charges arising out of that transaction could very possibly have affected the jurors decision regarding Petitioner's guilt. Without requiring

the government to bear its burden of proof, the Fifth Circuit Court of Appeals assumed that it did not.

Petitioner asserts that, faced with conflicting testimony as to whether jury impropriety took place, the trial Court made an egregious error in refusing to allow inquiry of the other jurors whether the impropriety took place. Said error greatly prejudiced Petitioner in that it hampered his ability to bear his burden of proving the alleged impropriety. Since the trial court failed to make a finding as to whether an impropriety took place, the Circuit Court of Appeals assumed that it did, noting that the record could have been more complete had the trial court, indeed, interviewed the other jurors. Having made the assumption that an impropriety took place, the Circuit Court below then ignored the requirement that the government bear the burden of proving that the impropriety did not prejudice Petitioner. The Court then engaged in faulty, subjective reasoning and determined that the Petitioner was not prejudiced.

Due to the foregoing, Petitioner was denied his right to a fair trial before an impartial jury, and is therefore entitled to a reversal of his conviction.

CONCLUSION

As previously set forth in his Petition, Petitioner respectfully submits that the decision and opinion of the Court of Appeals in this case raises important questions regarding the rights of Defendants to present an effective defense, to confront the witnesses against them, to be tried in the absence of highly prejudicial non-probitive evidence, and to be tried in front of an impartial jury. Petitioner therefore respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals of the Fifth Circuit so that these issues may be more fully examined through briefs and argument, and so they may receive the benefits of this Court's judgment and final resolution.

Respectfully submitted,

LEVINE, FREEDMAN, HIRSCH
& LEVINSON
Professional Association

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Loretta V. Anderson, Assistant U.S. Attorney for the Middle District of Florida, P.O. Box 600, Jacksonville, Florida 32201; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D.C.; and Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this _____ day of April, 1979.

_____

Attorney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1586

ERNEST A. WINKLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION

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APPENDIX A
Opinion of the Fifth Circuit Court of Appeals, below.

APPENDIX B
Order of the Fifth Circuit Court of Appeals, below, denying Petitioner/Appellant's Petition for Rehearing and Review.

APPENDIX C
Rule 103, Federal Rules of Evidence.

APPENDIX D
Rule 404, Federal Rules of Evidence.

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Ernest A. WINKLE, Defendant-Appellant.

Nos. 76-4145, 77-5195.

United States Court of Appeals, Fifth Circuit.

Jan. 11, 1979.

Defendant was convicted in the United States District Court for the Middle District of Florida, Ben Krentzman, J., of 19 counts charging the submission to the Government of medicare payment requests that contained fraudulent statements. On appeal, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) indictment was not insufficient; (2) no harmful errors appeared at trial, and (3) defendant was not entitled to new trial based on alleged jury impropriety.

Affirmed.

Roney, Circuit Judge, dissented and filed opinion.

1. Conspiracy ⇐28(3)

Under statute proscribing any conspiracy to defraud the United States, there is no requirement that the fraud comprise conduct that could be held unlawful under some other statute or rule. 18 U.S.C.A. § 371.

2. Indictment and Information ⇐71.4(3)

Indictment charging violation of statute proscribing any conspiracy to defraud the United States was not vague. 18 U.S.C.A. § 371.

3. Fraud ⇐69(2)

Indictment charging 19 substantive counts involving the submission to the Government of medicare payment requests that contained fraudulent statements was sufficient. 18 U.S.C.A. §§ 2, 1001.

4. Witnesses ⇐406

Impeachment to demonstrate the untruth of a witness' testimony is not excludable as hearsay because it is not offered primarily to prove the truth of the matter asserted, but to contradict the prior testimony. Fed.Rules Evid. rule 801(c), 28 U.S.C.A.

5. Criminal Law ⇐1036.1(9)

Court will not even consider the propriety of a decision to exclude evidence if no offer of proof was made at trial. Fed.Rules Evid. rule 103(a)(2), 28 U.S.C.A.

6. Criminal Law ⇐1036.1(9)

Although former proffer is not required, proponent of excluded evidence must show in some fashion the substance of his proposed testimony if reviewing court is to consider propriety of decision to exclude evidence. Fed.Rules Evid. rule 103, 28 U.S.C.A.

7. Criminal Law ⇐670

Defense counsel's statement that defendant would testify as to his version of conversations he had with other witnesses was not sufficient to make known to court the substance of the evidence and did not constitute an adequate offer of proof. Fed.Rules Evid. rule 103, 28 U.S.C.A.

8. Criminal Law ⇐338(1)

In prosecution for submission to the Government of medicare payment requests that contained fraudulent statements, it was within discretion of trial court to exclude as irrelevant defend-

ant's testimony regarding his interpretation of a medicare publication and his conversations in correspondence with various persons at the Social Security Administration Bureau of Health Insurance and Florida Department of Health and Rehabilitative Services. 18 U.S.C.A. §§ 2, 1001.

9. Criminal Law ⇐371(3)

In prosecution for submission to the Government of medicare payment requests that contained fraudulent statements, court did not err in permitting Government to introduce evidence of wrongful acts extrinsic to immediate prosecution. 18 U.S.C.A. §§ 2, 1001; Fed.Rules Evid. rule 404, 28 U.S.C.A.

10. Criminal Law ⇐1169.1(2)

In prosecution for submission to the Government of medicare payment requests that contain fraudulent statements, error in overruling objection to testimony with respect to contents of certain charts which Government failed to produce although available was harmless beyond a reasonable doubt. 18 U.S.C.A. §§ 2, 1001; Fed.Rules Evid. rule 1002, 28 U.S.C.A.

11. Criminal Law ⇐683(2)

Scope of rebuttal testimony is ordinarily a matter to be left to sound discretion of trial judge.

12. Criminal Law ⇐683(2)

In prosecution for submission to the Government of medicare payment requests that contained fraudulent statements, court did not abuse its discretion in ruling on evidentiary matters in rebuttal and surrebuttal. 18 U.S.C.A. §§ 2, 1001.

13. Fraud ⇐69(7)

In prosecution for submission to the Government of medicare payment requests that contained fraudulent statements, court's instruction to jury that statements made in billing forms were material was proper. 18 U.S.C.A. §§ 2, 1001.

14. Criminal Law ⇐1172.1(1)

In prosecution for submission to the Government of medicare payment requests that contained fraudulent statements, there was no reversible error in court's instructions on relevant medicare statutes and regulations. 18 U.S.C.A. §§ 2, 1001.

15. Criminal Law ⇐1144.15

In any trial, there is initially a presumption of jury impartiality; prejudice will not be presumed, but can be demonstrated by a defendant by a preponderance of credible evidence.

16. Criminal Law ⇐855(1)

Jury prejudice may be shown by evidence that extrinsic factual matter tainted jury's deliberations; any prejudicial factual intrusion denies a defendant his right to trial by an impartial jury and to challenge the facts adverse to him that are made known to the jury.

17. Criminal Law ⇐868

Where a colorable showing of extrinsic jury influence appears, court must investigate asserted impropriety.

18. Criminal Law ⇐1144.15

An adequate demonstration of extrinsic influence upon jury overcomes presumption of jury impartiality; it shifts burden to Government to demonstrate that influence in question was not, in fact, prejudicial.

19. Criminal Law ⇐1174(1)

Even though jury learned of codefendant's plea of guilty to conspiracy count, defendant was not prejudiced when jury returned guilty verdict to substantive counts where conspiracy count was the only count which defendant and codefendant were jointly charged with and jury did not return guilty verdict on conspiracy count.

Appeals from the United States District Court for the Middle District of Florida.

Before RONEY, RUBIN and VANCE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An intricate and clever scheme to defraud the Government of money asserted to be due for Medicare services resulted in a lengthy and complicated indictment, a protracted trial, and a verdict of guilty. The defendant seeks to overturn that verdict by charging a bevy of errors in the indictment and trial. Because we find his arguments without merit, or the errors asserted harmless beyond a reasonable doubt, we affirm.

Ernest Winkle and three co-defendants were charged with conspiring to defraud the United States by securing unlawful Medicare payments.[1] In the same indictment, Winkle and two of the three co-defendants were named in 19 additional counts charging the submission to the Government of Medicare payment requests that contained fraudulent statements.[2] Alan Colmar, a nursing home administrator who was charged only with conspiracy, pleaded guilty to a reduced charge after the jury selection process in this case had begun. After the trial of a second co-defendant was severed,[3] and the substantive charges against the remaining co-defendant were dismissed, Winkle and Joseph DiStefano were tried together on the conspiracy count and on the substantive charges against Winkle alone. During the three-week trial the parties called nearly 60 witnesses. The jury was unable to reach a verdict on the conspiracy count, but convicted Winkle on all substantive counts.[4] On the Government's motion, the conspiracy count against Winkle was dismissed.[5] We set forth below the complex facts of this case only in detail sufficient to make comprehensible our analysis of the relatively straightforward principles of law that result in the denial of the relief he seeks.

1. 18 U.S.C. § 371.

2. 18 U.S.C. §§ 2 and 1001.

3. The co-defendant severed from the trial was Ernest Winkle's wife, Leonarda Winkle. She has not yet been tried on any charge.

4. Winkle was sentenced to imprisonment for five years on each count, Two through Twenty, the sentences on Counts Three through Twenty to run concurrently with the sentence on Count Two.

5. F.R.Cr.P., Rule 48(a).

I.

Factual Background

The conspiracy charged by the Government had three aspects: first, the defendants initiated a sales scheme for a Tampa, Florida, medical laboratory under which physicians ordered lab tests, at no charge to their patients; the lab then charged Medicare and unlawfully remitted "interpretation" or "consultation" fees to the referring physicians. Second, the defendants solicited and charged Medicare for the laboratory business of several chiropractors when they knew that those services for chiropractic physicians could not lawfully be charged to Medicare. Third, the defendants conducted a program of respiratory testing and inhalation therapy for nursing home patients, and billed Medicare for such tests and therapy, although no physician

had determined that either the tests or therapy were medically necessary as required by the applicable statutes and regulations.[6]

The 19 substantive counts grew out of the defendants' inhalation therapy program. Evidence showed that the defendant Winkle had submitted 19 Medicare out-patient billing forms, prepared by him or at his direction, for medically unnecessary therapy. The Government introduced the forms, each of which indicated a diagnosis of "upper respiratory infection" or "emphysema" that the treating physician, Dr. Alvarez, as a Government witness, denied making. Dr. Alvarez further testified that he had neither ordered nor given permission for either the tests or the therapy treatments in question.

II.

Sufficiency of the Indictment

The defendant urges that the court below erred in not dismissing the indictment because of a variety of alleged deficiencies.

Winkle argues, first, that the conspiracy count is impermissibly vague and, in violation of F.R.Cr.P., Rule 7(c)(1), does not afford "a plain, concise and definite written statement of the essential facts constituting the offense charged." He further asserts that the indictment, in violation of Rule 7(c)(1), omits "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."[7]

[1] These contentions are frivolous. Count One specifically alleges a violation of Title 18, Section 371 of the United States Code, which proscribes any conspiracy to defraud the United States.[8] There is no requirement that the fraud comprise conduct that could be held unlawful under some other statute or rule:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.

Haas v. Henkel, 1910, 216 U.S. 462, 479, 30 S.Ct. 249, 254, 54 L.Ed. 569, 577; *accord, United States v. Johnson*, 1966, 383 U.S. 169, 172, 86 S.Ct. 749, 751, 15 L.Ed.2d 681, 684. It is essential only that an indictment under 18 U.S.C. § 371 "properly [charge] a conspiracy, and with the required specificity [allege] the culpable role" of each of the alleged conspirators. *Dennis v. United States*, 1966, 384 U.S. 855, 860, 86 S.Ct. 1840, 1844, 16 L.Ed.2d 973, 978.

6. 42 U.S.C. §§ 1395x and 1395y(a)(1); 20 C.F.R. § 405.250 [relating to Medicare Part B]; Intermediary's Part B Manual for Receiving and Processing Claims, § 2070.1.

7. The dismissal of Count One under F.R.Cr.P., Rule 48(a), does not moot the defendant's sufficiency or vagueness arguments, because such a dismissal is without prejudice to the filing of a new indictment on the same charge. *United States v. Davis*, 5 Cir. 1973, 487 F.2d 112, 118, *cert. denied*, 1974, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878.

8. 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[2] The indictment before us clearly passes this test. It alleges that the object of the conspiracy to defraud was:

> causing the payment of Medicare benefits under the provisions of Title XVIII of the Social Security Act, as amended (42 U.S.C. §§ 1801 1879 [1395 1395pp]), to be made in amounts greater than the amounts which were properly payable and which excess payments were not authorized under Title XVIII of the Social Security Act.

It further elaborates that the defendants arranged reimbursement for "medically unnecessary lab tests" by Medicare,

> when in fact that program authorizes payment and reimbursement as provided in Title XVIII of the Social Security Act, Sections 1861 and 1862(a)(1), for only those tests which are medically necessary.

Thus, even if reference to other statutes or rules, the contravention of which would constitute fraud, were necessary to complete a charge under 18 U.S.C. § 371, sufficient notice of the relevant statutes is afforded by this indictment. The thrust of the Government's case was, in the instance of lab tests, that physicians ordered tests not properly related to their patients' diagnosis or treatment,[9] and, in the case of inhalation therapy, that Winkle charged for tests and treatments that physicians did not order at all. With respect to the latter, in particular, the defendant testified:

> Well, we can't do any testing and submit for payment to Medicare unless we did have a doctor's order and that is also true of any treatments that would be instituted.

This is precisely the interpretation for which the Government argues. We cannot discern any undue vagueness in the indictment.

[3] We must also reject Winkle's argument that he would be prejudiced by a prosecution under any count of the indictment because the language of the indictment might be deemed to track either 18 U.S.C. § 1001 or 42 U.S.C. § 1395nn.[10] The indictment specifically

9. 20 C.F.R. § 405.250 provides, in relevant part:

> Payment for medical and other health services furnished by a participating provider of services is made to such provider only if:
>
> * * * * * *
>
> (b) A physician certified that: (1) In the case of medical and other health services, such services were medically required.

10. 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

42 U.S.C. § 1395nn provides:

> (a) Whoever—
>
> (1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this subchapter,
>
> (2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit or payment,
>
> * * * * * *
>
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> (b) Whoever furnishes items or services to an individual for which payment is or may be made under this subchapter and who solicits, offers, or receives any—

names the former statute as the rule of law on which the substantive counts rely. To the extent that the same conduct could be punished under either statute, the choice lies within the discretion of the prosecutor. *United States v. Chakamakis*, 5 Cir. 1971, 449 F.2d 315. Were the Government to attempt a second prosecution, under a different statute, for the same conduct at issue in this case, the defendant could properly raise a double jeopardy claim at that time. Absent a second prosecution, the defense is, of course, premature. The indictment is clear, concrete and specific; that is enough to meet the defendant's challenge.

III.

Conduct of the Trial

The defendant urges that his convictions should be reversed because the trial judge erroneously excluded evidence favorable to the defendant, the trial judge erred in admitting evidence of similar wrongful acts, the judge erred in his rulings regarding the conduct of rebuttal and surrebuttal, and the judge erred in his instructions to the jury.

[4] The defendant urges that the trial court erred in excluding as hearsay his renditions of conversations with his salesmen, Matthew Rackstein and Gerald Talty, with Drs. Nessan McCann, Frank Norton and Robert Moorehead, and with his wife, Leonarda Winkle; he would have contradicted their testimony regarding the same conversations, and, therefore, this was proper impeachment and should not have been excluded as hearsay. *See* F.R.Evid. Rule 801(c). *See United States v. Palacios*, 5 Cir. 1977, 556 F.2d 1359, 1362-63; *United States v. Sisto*, 5 Cir. 1976, 534 F.2d 616, 622-23 (dicta). (No argument is made that Winkle's testimony was admissible for substantive purposes.) The legal proposition on which the assertion is based is correct; impeachment to demonstrate the untruth of a witness' testimony is not excludable as hearsay because it is not offered primarily to prove the truth of the matter asserted, but to contradict the prior testimony. J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 607[06] (1977). However, a crucial prerequisite to concluding that the ruling was erroneous is missing.

[5] Rule 103(a)(2) of the Federal Rules of Evidence provides that error may not be based on a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." While some circuits have apparently taken a more lenient approach, *e. g.*, *Charter v. Chleborad*, 8 Cir. 1977, 551 F.2d

> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or
> (2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services,
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
> (c) Whoever knowingly and willfully makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution or facility in order that such institution or facility may qualify (either upon initial certification or upon recertification) as a hospital, skilled nursing facility, or home health agency (as those terms are defined in section 1861 [42 USCS § 1395x]), shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

246, 248-9, *cert. denied*, 434 U.S. 856, 98 S.Ct. 176, 54 L.Ed.2d 128, this circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial. *Mills v. Levy*, 5 Cir. 1976, 537 F.2d 1331, 1333; *United States v. Muncy*, 5 Cir. 1976, 526 F.2d 1261, 1263. *See also Elliott v. Maggiolo Corp.* 2 Cir. 1975, 525 F.2d 439, 444; *Nanda v. Ford Motor Co.*, 7 Cir. 1974, 509 F.2d 213, 223.

[6, 7] We do not require a formal proffer; but the proponent of excluded evidence must show in some fashion the substance of his proposed testimony. The defendant here gave no indication concerning what he would have testified or the manner in which his contradiction or denial of what had already been adduced would have been admissible or helpful. While the defendant was given the opportunity to do so, outside the presence of the jury, his counsel merely stated that Winkle would testify as to *his version* of the conversations that he had with Rackstein, Talty, McCann, Norton, Moorehead, and Mrs. Winkle. This was not sufficient to make known to the court the *substance* of the evidence. *See* J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103[04] at 103-38 (1977); 10 Moore's Federal Practice § 103.22 (2d ed. 1976). Because an adequate offer of proof was not made, we "may not" find error under Rule 103, as interpreted in this circuit. Moreover, an analysis of the evidence that had been admitted in the light of what Winkle proposed to say, so far as the record permits some kind of inference, fails to persuade us that the exclusion of the testimony was harmful. Rather than unduly prolong this opinion, we have discussed each of the instances in the footnote.[11]

11. *Rackstein's conversation with Winkle.* Part of Rackstein's testimony concerned Winkle's January 1975 address before the Pinellas County Chiropractic Association. Because Winkle was not convicted on the first count of the indictment, he could not have been prejudiced by the exclusion of testimony about this meeting. We also note that Winkle admitted speaking before the Chiropractic Association, thus any difference in the accounts of what was said between Rackstein and Winkle just before Winkle spoke to the group would go to the degree of Winkle's surprise at discovering himself at a meeting of chiropractors. Rackstein did not discuss another conference that he and Winkle held with Bernie Oppenheim prior to the meeting with the chiropractors. Thus the exclusion of Winkle's account of Rackstein's remarks at that conference was proper.

Winkle also sought to testify as to several conversations with Rackstein that took place on March 13, 1975, before, during and after a luncheon meeting with Dr. McCann. Rackstein did not testify about these conversations. Consequently, the exclusion of Winkle's testimony concerning these, as hearsay was correct.

Talty's conversation with Winkle. Talty testified that Winkle told him he was not selling the program correctly; Winkle re-explained how the participating doctors would receive double payment for medicare patients and said the program was legal. In the testimony that was admitted, Winkle denied that he had told Talty to offer double payments to doctors. Winkle did not seek to testify to anything else concerning his conversation with Talty. Because Talty related only what Winkle said about the program, it was proper to prevent Winkle from testifying as to what Talty said on that occasion.

Dr. McCann's conversation with Winkle. Winkle was not permitted to testify to the conversation of the other participants at the luncheon meeting on March 13, 1975. Dr. McCann's testimony about the luncheon meeting was limited to what Winkle said to him and to identifying the check that was given to him at that meeting; Dr. McCann did not testify to what he personally said at the luncheon. Winkle was permitted to relate what *he said* at the luncheon and the circumstances under which the check was given to Dr. MCann. The exclusion of Winkle's version of *what Dr. McCann said* at that meeting was correct.

[8] The trial judge excluded as irrelevant the defendant's testimony regarding his interpretation of a Medicare publication, and his conversations and correspondence with various persons at the Social Security Administration Bureau of Health Insurance and the Florida Department of Health and Rehabilitative Services. The judge's rulings on this evidence, as well as the proffered list of prevailing Medicare rates, were well within his discretion concerning questions of relevance. *United States v. Bryant*, 5 Cir. 1974, 490 F.2d 1372, 1378, *cert. denied*, 419 U.S. 832, 95 S.Ct. 57, 42 L.Ed.2d 58.

[9] The court did not err in permitting the Government to introduce evidence of wrongful acts extrinsic to the immediate prosecution. The Government produced requisitions that were purportedly signed in 1972 by a Dr. William Braell of Elmira, N.Y. for two patients' x-rays; attached were request forms for Medicare payments for the x-rays that had been mailed to Blue Cross. These forms indicated that the provider of services was Integrated Medical X-Ray Services, and the requests for payment were signed "Ernest A. Winkle." Dr. Braell testified that he had ordered neither x-ray, and that, in one instance, he had expressly declined to sign the form, which someone named Ernest Winkle had brought to him; he had refused because the person named on the form was not Dr. Braell's patient. Dr. Braell's signature on the second form was, according to Dr. Braell, not only forged, but misspelled. The Government subsequently called a former employee of the defendant, who testified that, to his personal knowledge, the defendant was president of Integrated Medical X-Ray Services up until at least two months prior to the submission of the forms in question to Blue Cross.

Rule 404 of the Federal Rules of Evidence permits the introduction of evidence of extrinsic acts to show intent and the absence of mistake or accident, issues squarely raised by Winkle's defense. The evidence offered was relevant and, as the court properly determined, probative and not unfairly prejudicial, especially in view of the court's limiting instructions. *United States v. Beechum*, 5 Cir. 1978, 582 F.2d 898 (en banc).

Dr. Norton's conversation with Winkle. Winkle was allowed to testify what he said during a telephone conversation with Dr. Norton in May 1975. However, the judge refused to let Winkle relate what Dr. Norton said in this conversation. The exclusion of this evidence was proper because Dr. Norton's testimony never mentioned this conversation. Dr. Norton said that he never had an opportunity to question Winkle in regard to the inhalation therapy program at Colonial Manor Nursing Home. Winkle was never asked whether Norton had interrogated him; had this question been put, a simple "yes" or "no" answer might have furnished the predicate for further testimony, or for finding error in its exclusion. *Dr. Moorehead's conversation with Winkle.* Dr. Moorehead was permitted to testify regarding a telephone conversation that he had with Winkle during June or July of 1975 on the subject of money that Winkle's laboratory owed him. During his testimony, Dr. Moorehead related only what Winkle told him. The one statement that Dr. Moorehead attributed to himself was that he told Winkle that Rackstein had not represented himself as a doctor. This statement is not prejudicial to Winkle. It was not harmful error to exclude *Winkle's version of Dr. Moorehead's remarks* during their telephone conversation.
Leonarda Winkle's conversation with Winkle. Winkle was not permitted to give his version of his wife's words in their first conversation about filling out Medicare out-patient provider billing forms. This exclusion was also proper, and, in view of his wife's testimony, harmless beyond doubt.

[10] On rebuttal, the Government produced a therapist to rebut Mrs. Winkle's testimony concerning the manner in which the diagnostic information reported on the billing forms was obtained, and a doctor to rebut testimony that blanket orders had been given to permit the respiratory testing of his patients.[12] The testing and treatment of these patients were comprised only in the conspiracy count, although they might be considered evidence of extrinsic acts relevant to the issue of intent with respect to the substantive counts as well. The judge incorrectly overruled an objection to the doctor's testifying with respect to the contents of the charts, notwithstanding the Government's failure to produce the charts themselves, which concededly were available. F.R.Evid., Rule 1002. In view of the limited relevance of the witness's testimony to the defendant's convictions, and the content of his testimony, we are persuaded that the defendant's inability to cross-examine the witness on the basis of the original charts was harmless beyond a reasonable doubt.

In the course of the first rebuttal witness's testimony, he described an "incentive plan" for the respiratory therapists that Winkle allegedly put into effect although the therapists did not receive any money under the plan. The defense proffered further testimony by the defendant DiStefano tending to show that the plan was considered, but not put into effect. The court refused to permit such testimony in surrebuttal.

[11, 12] The scope of rebuttal testimony is ordinarily a matter to be left to the sound discretion of the trial judge. *Geders v. United States*, 1976, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592, 598; *United States v. Sadler*, 5 Cir. 1974, 488 F.2d 434, 435, *cert. denied*, 417 U.S. 931, 94 S.Ct. 2642, 41 L.Ed.2d 234. In this case, the new issue raised on rebuttal was of tangential relevance. The proffered surrebuttal testimony was not entirely contradictory, and, indeed, the witness's proffered testimony concerning the reason why an incentive plan was considered, *i. e.*, the therapists thought the defendants' lab was "making a tremendous amount of money" and they "wanted more," would have been helpful to the Government. Under these circumstances, the judge's ruling was not an abuse of discretion.

The defense also proffered in surrebuttal the further testimony of a therapist who had already appeared for the Government; her testimony with regard to the defendant's representations *vel non* as to the existence of doctors' orders for inhalation tests and therapy would not have been addressed to a new issue. The defense was itself not sure of what she would have said on the matter in dispute. Again, the denial of surrebuttal was not an abuse of discretion.

[13] The defense asserts that, in instructing the jury, the court invaded the jury's province by stating that the statements made in the billing forms involved in Counts Two through Twenty were material. The requirement of materiality under the second, or "false statement" clause of 18 U.S.C. § 1001,[13] is a judge-made limitation to insure the reasonable application of the statute. *United States v. Beer*, 5 Cir. 1975, 518 F.2d 168, 170. We have repeatedly viewed the question of materiality in a "false statement" prosecution as a question of law for de-

12. The court properly excluded, as not pertaining to a newly raised issue, the evidence of a third proffered rebuttal witness.

13. *See* note 10, *supra*.

termination by the court. *United States v. Krause*, 5 Cir. 1975, 507 F.2d 113, 118; *cf. United States v. Crippen*, 5 Cir. 1978, 570 F.2d 535, *rehearing and rehearing en banc denied*, 579 F.2d 340. *United States v. Haynie*, 5 Cir. 1978, 568 F.2d 1091; *United States v. Beer, supra*. Consequently, the instruction was proper.

[14] We also find no reversible error in the court's instructions on the relevant Medicare statutes and regulations. Although one or two phrases, if taken wholly out of context, might tend to mislead, the charges taken as a whole and read against the factual background of this case were proper. *United States v. Wells*, 5 Cir. 1975, 506 F.2d 924; *United States v. Jackson*, 5 Cir. 1972, 470 F.2d 684, *cert. denied*, 1973, 412 U.S. 951, 93 S.Ct. 3019, 37 L.Ed.2d 1004.

IV.

Jury Impropriety

The defendant finally asserts as error the court's denial of his motion for a new trial based on alleged jury impropriety.

Voir dire of the jury began on Thursday, July 22, 1976. Alan Colmar, who had not yet pleaded guilty to any charge, was present before the jury. On July 23, Colmar entered his plea. The trial began after the weekend. The judge inquired of counsel what, if anything, they wished the jury to be told concerning Colmar's absence. The defense asked that nothing be said; the Government took no position. The jury was not told the reason for Colmar's absence.

After the jury rendered its verdict, its foreman, a member of another state's bar, telephoned Winkle's trial counsel to discuss various aspects of the case in which he was interested. According to the trial counsel, the foreman told him that one juror, a barber named Shifler, had disclosed to the jury that he knew Colmar had pleaded guilty. Trial counsel discussed the development with Winkle, who, according to counsel, decided that he did not want to raise the issue in a motion for new trial for fear it would affect his sentencing. Consequently, trial counsel failed to mention the possible impropriety to the court.[14]

After the defendant was sentenced, trial counsel withdrew, and the defendant retained new counsel to handle his appeal. New counsel, upon learning of the possible impropriety, filed a motion of intention to interview the trial jurors. The court ordered that no interviews be held, but scheduled a hearing, at which it considered the testimony of trial counsel and of the jury foreman.

The foreman testified that, during the jury's consideration of Count One, a woman juror named Marjorie Graham had said to the jury that Colmar had pleaded guilty. The foreman did not recall having heard any such statement from another juror. The defendant's trial counsel recounted his version of his telephone conversation with the foreman, and the circumstances surrounding his failure to notify the court of the asserted impropriety.

The defendant moved for a new trial. The court supplemented its first hearing by taking the testimony, several weeks later, of Graham. She testified that she had "supposed" Colmar had pleaded guilty, but did not recall saying so to the jury.[15] The court denied Winkle's new trial motion based on the hearing, his repeated instructions to the jury to avoid extrinsic influences on their deliberations, and the trial counsel's ethical breach both in speaking to the jury foreman and in not reporting the incident to the court.[16]

[15, 16] The basic principles under which the question before us must be resolved are well-settled. In any trial, there is initially a presumption of jury impartiality; prejudice will not be presumed, but can be demonstrated by a defendant by a preponderance of credible evidence. *United States v. Wayman*, 5 Cir. 1975, 510 F.2d 1020, 1024, *cert. denied*, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67. Such prejudice may be shown by evidence that extrinsic factual matter tainted the jury's deliberations; any "prejudicial factual intrusion" denies a defendant his rights to trial by an impartial jury and to challenge the facts adverse to him that are made known to the jury. *United States v. Howard*, 5 Cir. 1975, 506 F.2d 865, 866; *Remmer v. United States*, 1954, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654, 656.

[17, 18] Where a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety:

> The evidentiary inquiry before the district court . . . must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the district court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant. . . . In this determination, prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the Government to demonstrate the harmlessness of any breach to the defendant.

United States v. Howard, supra, 506 F.2d at 869. Thus, an adequate demonstration of extrinsic influence upon the jury overcomes the presumption of jury impartiality; it shifts the burden to the Government to demonstrate that the influence in question was not, in fact, prejudicial.

In the case before us, the record indicates that the fact of Colmar's plea was published in a newspaper. Winkle's trial counsel recalled that the foreman told him that the juror who knew of Colmar's plea had read about it.[17] At the hearing, the foreman could not recall the source from which the juror knew of Colmar's plea.[18] Given this evidence, and the fail-

14. The defendant later submitted to the trial court an article from The Tampa Tribune, dated July 27, 1976, that reported Colmar's plea and from which a juror hypothetically could have learned of that plea. The jurors were repeatedly instructed throughout the trial not to read anything concerning the trial.

15. The juror testified that her husband, who was not bound to disregard public reportage of the trial, drove her to court each day and remained there through most of the proceedings. She denied, however, that she had discussed the case with him prior to its conclusion.

16. *See* Rules of the United States District Court, Middle District of Florida, Rule 2.04(c); Code of Professional Responsibility of the Florida Bar, D.R. 7-108(D); E.C. 7-29.

17. Q [By Mr. Levine]: Mr. Dempsey, do you have any recollection as to the source of the information that was extraneous and presented before the jury? Did Mr. Putnam at any time allude to the source of the barber's information?

A: I believe it's—my recollection is that it was a newspaper article and I believe he said that it was Mr. Shifler who had read the newspaper and so commented.

18. Q: Did he say how—did the juror say how he knew that [Colmar had pleaded guilty]?

A: I can't say that definitely. I don't recall how the juror knew that.

Q: Did he say he had read about it in the newspaper?

ure of the trial judge to say so, we can neither conclude that he found no extrinsic influence to have existed nor rest our disposition on an assessment of such a finding.[19] We thus assume that a jury breach occurred, and consider the question of prejudice.

The sole count on which Colmar was tried jointly with other people was the conspiracy count, on which he was not convicted. The jury foreman testified that the fact of Colmar's plea was discussed in relation to the jury's deliberations on that count. By contrast, the defendant Winkle was convicted of 19 substantive offenses, the evidence of which, both documentary and testimonial, was not only relatively discrete but damning. We fail to discern any genuine possibility of prejudice to the defendant in his trial on the substantive counts from the jury's awareness, with respect to the conspiracy count, that he may have associated with a criminally-tainted individual.

[19] In *United States v. Hansen*, 5 Cir. 1977, 544 F.2d 778, we reversed the conviction of a defendant after the trial court informed the jury that his co-defendant had pleaded guilty; in *Hansen*, unlike this case, the jury had no previous knowledge that any co-defendant existed. We said:

> The prejudice to the remaining parties *who are charged with complicity in the acts of the self-confessed guilty participant* is obvious.

Id., 544 F.2d at 780 (emphasis supplied). Here, Winkle was not found guilty on any count in which he was charged with "complicity in the acts of the self-confessed guilty participant," Colmar. The jury breach created no apparent prejudice to the defendant Winkle.[20]

Because we find no insufficiency in the indictment, no harmful error at trial, and no prejudice accruing to Winkle from the uncontrolled presentation to the jury of an extrinsic fact, the convictions of the defendant are AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. Six witnesses were allowed to testify as to conversations they had with defendant Winkle. Testifying in his own defense, Winkle attempted to testify as to his version of these conversations. The trial court allowed him to testify only as to his own remarks, apparently under the impression that testimony as to what others said in the same conversation was hearsay. As Judge Rubin points out in his opinion, this ruling was wrong.

Judge Rubin, however, would affirm the trial court's ruling on the ground that the proffer was inadequate, and on the further ground that "in light of what Winkle proposed to say, so far as the record permits some kind of inference, [an analysis of the evidence] fails to persuade us that the exclusion of the testimony was harmful." My view of the law and the record is that a sufficient proffer was made, under the circumstances permitted by the trial court. Winkle indicated that he wanted to testify as to his recollection of the conversations previously testified to by the Government witnesses. What his recollection might be is irrelevant to the question of admissibility. He had a right to testify as to these conversations, even if his recollection was essentially the same as the testimony of the Government witnesses, which it apparently was not. The error severely curtailed the ability of the defendant to present his testimony which the jury was entitled to hear. In my judgment, the record of the trial does not support a decision that the error was harmless beyond a reasonable doubt.

I would reverse the conviction and remand for a new trial.

A: At the moment, I can't remember whether—whether that was stated or not, whether he had read it in the newspaper or found out from some other source.

19. A more complete record could have been made on this point had the court interviewed the juror Shifler, who was implicated by virtue of Winkle's lawyer's recollection.

20. This case is entirely distinguishable from cases in which the relevant extrinsic influence, once proven, is so egregious that prejudice must be inferred, *e. g., Stimack v. Texas*, 5 Cir. 1977, 548 F.2d 588, in which a male caller telephoned several jurors, identified himself as defense counsel, and told the jurors that they would be killed by the Mafia if they convicted the defendant; *United States v. Kum Seng Seo*, 3 Cir. 1962, 300 F.2d 623, in which a juror clipped and, just prior to the jury's vote, read to her fellow jurors a newspaper story concerning the trial, which contained inaccurate and prejudicial statements about the defendant.

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APPENDIX B

B-1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NOS. 76-4145 & 77-5195

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERNEST A. WINKLE,
Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
(February 8, 1979)
Before RONEY, RUBIN and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Form 703-2

APPENDIX C

C-1

FEDERAL RULES OF EVIDENCE

Rule 103

Rulings On Evidence

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

* * *

APPENDIX D

FEDERAL RULES OF EVIDENCE

Rule 404

Character Evidence Not Admissible
To Prove Conduct; Exceptions;
Other Crimes

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendices to Petition for Writ of Certiorari has been furnished by U.S. Mail to Loretta V. Anderson, Assistant U.S. Attorney for the Middle District of Florida, P.O. Box 600, Jacksonville, Florida 32201; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D.C.; and Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this_____day of April, 1979.

_____

Attorney

No. 78-1586

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST A. WINKLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 587 F. 2d 705.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1979. A petition for rehearing was denied on February 8, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on March 12, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed reversible error in excluding certain testimony when no offer of proof was made by petitioner.

2. Whether evidence of petitioner's prior similar conduct was properly admitted at trial.

3. Whether the district court properly denied petitioner's motion for a new trial based on alleged extrinsic influence on the jury's deliberations.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on 19 counts of submitting fraudulent Medicare payment requests, in violation of 18 U.S.C. 2 and 1001. He[1] was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed, one judge dissenting (Pet. App. A).

At trial, the government introduced evidence to support the charge that petitioner engaged in a conspiracy with other persons to obtain government payments for services not lawfully compensable under the Medicare program. The conspiracy had several parts.

First, petitioner, while head salesman of a Tampa, Florida medical laboratory, engaged in a physician kickback scheme (1A Tr. 59, 66, 72). Petitioner and his trained team of salesmen would offer physicians medical testing services free of charge (1A Tr. 66, 435; 3A Tr. 1308). Petitioner's laboratory, in turn, would bill Medicare and then remit to the physician a "referral fee" or kickback (1A Tr. 66, 438; 2A Tr. 651). In a second arrangement, petitioner caused chiropractors to order tests from his lab. Despite a statutory provision (42

U.S.C. 1395x(r)(5)) barring Medicare payments for such chiropractic services, petitioner charged those tests to the Medicare program (1A Tr. 83; 2A Tr. 592, 617-619, 632-633). Some of the chiropractors participating in this scheme also received kickbacks (2A Tr. 616, 639, 651, 704, 742). A third arrangement used to defraud the Medicare program involved a scheme by which petitioner would induce nursing home personnel to order respiratory tests for patients, despite the fact that they were not medically required (1A Tr. 92-94; 3A Tr. 1312-1313).[1] In furtherance of that plan, petitioner submitted 19 billing forms to Medicare bearing fictitious diagnoses and claiming payment for therapies never authorized by a physician (1B Tr. 62-70, 258-259; 3A Tr. 1459-1472).[2] The submission of these spurious billing forms provided the basis for the substantive counts of the indictment on which petitioner was convicted.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-9) that the district court erred in excluding evidence of his recollection of certain statements made by government witnesses during conversations with him.[4] He contends that his recollection of the

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[1]42 U.S.C. 1395y(a)(1) prohibits the payment of Medicare funds for medical expenses "which are not reasonable and necessary for the diagnosis or treatment of illness or injury * * *."

[2]42 C.F.R. 405.250(b)(1) requires claims for payment to be accompanied by a physician's certification that medical or health services actually rendered were "medically required."

[3]The jury was unable to reach a verdict on the count of the indictment alleging conspiracy. On the government's motion, the conspiracy count was dismissed.

[4]Petitioner was permitted to testify as to the substance of his own remarks during conversations with the witnesses, but was not permitted to testify about the remarks of the others.

substance of those conversations would have impeached the testimony of the government witnesses.

In an opinion on which we generally rely, the court of appeals concluded (Pet. App. A-6) that any error in excluding such testimony did not constitute reversible error because petitioner, as the proponent of the excluded evidence, failed to comply with the requirement of Fed. R. Evid. 103(a)(2) that he disclose the substance of his proposed testimony.[5] That holding was correct.

Compliance with the requirement of an offer of proof enables the trial judge to determine whether the proffered evidence is relevant and competent, or whether it is cumulative or otherwise inadmissible. See Fed. R. Evid. 402, 403. It also ensures that the record will be sufficiently developed to permit appraisal by an appellate court of the propriety of the ruling in a particularized context. See 1 *Weinstein's Evidence* para. 103[03], at 103-27 (1978).

As noted by the court of appeals (Pet. App. A-7), the mere recital by counsel that petitioner would testify as to "his version" of the conversations in question fell far short of indicating "the manner in which his contradiction or denial of what had already been adduced would have been admissible or helpful." Counsel's recital certainly did not show the impeachment value of the excluded testimony. Moreover, the "context" of the preceding testimony did not apprise the trial court of the relevance and necessity of the undisclosed testimony. It is also clear that an offer of proof would have been easy to render, since petitioner's

[5]Under Rule 103(a)(2), error cannot be predicated on a ruling excluding evidence unless the trial judge was informed of the substance of the proposed testimony through an offer of proof, or could ascertain the substance of the testimony from the context.

attorney was not faced with a situation where he was unaware of what the witness would say. Accordingly, the court below was fully justified in declining to entertain a claim of erroneously excluded testimony where petitioner's counsel made no effort to comply with the requirement of an intelligible offer of proof.

Moreover, as the court below also concluded, any error in placing limitations on petitioner's testimony was harmless (Pet. App. A-7 n.11). As the court noted, there was little point to be made by the proposed testimony. *Ibid.* For the most part, the witnesses that petitioner sought to contradict with his recollection of the conversations in question either did not testify concerning the conversations or merely recounted in court what petitioner had stated. Petitioner was afforded full opportunity to explain what he said and what he did not say, thereby correcting any misimpressions about the substance of his remarks. Similarly, there was no prejudice in foreclosing petitioner's account of his wife's words during their initial conversation concerning the preparation of Medicare billing forms (Pet. App. A-8 n.11). Mrs. Winkle, who appeared as a defense witness, stated that petitioner was generally unfamiliar with the forms (1B Tr. 593-594). Petitioner's own testimony (2B Tr. 1042) shows that he did not intend to contradict his wife's recollection on this matter. Mrs. Winkle was a defense witness, and petitioner gave no indication that he intended to impeach her credibility.[6]

[6]The district court's rulings on the admissibility of evidence, relating to the credibility of various witnesses, were routine discretionary rulings. The question on review, as recognized by the court of appeals, was whether, under all the circumstances, any error in such rulings affected petitioner's substantial rights. See Fed. R. Evid. 103(a). It is not necessary to inquire whether such rulings were "harmless beyond a reasonable doubt," as would be the case if constitutional error were at issue. See, *e.g.*, *United States* v. *Valle-Valdez*, 554 F. 2d 911, 915-916 (9th Cir. 1977).

2. Petitioner also contends (Pet. 15-18) that evidence of his participation in prior similar Medicare transactions should not have been admitted at trial. As the court of appeals correctly held (Pet. App. A-8), however, such evidence was relevant to petitioner's intent to defraud the government and also tended to show the absence of mistake or accident on his part.

It is well established that evidence of prior similar acts, whether or not those acts are themselves illegal, may be introduced to prove a defendant's intent, preparation, plan, knowledge, or the absence of mistake. Rule 404(b), Fed. R. Evid.; *Andresen* v. *Maryland*, 427 U.S. 463, 483-484 (1976). Such evidence is admissible unless its probative value is outweighed by its prejudicial effect. Fed. R. Evid. 403. See *United States* v. *Gubelman*, 571 F. 2d 1252, 1255 (2d Cir.), cert. denied, 436 U.S. 948 (1978); *United States* v. *James*, 555 F. 2d 992, 998-999 (D.C. Cir. 1977); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977). The determination whether the evidence should be admitted under this standard is a matter committed to the discretion of the trial court. See, *e.g.*, *United States* v. *Bloom*, 538 F. 2d 704, 709 (5th Cir. 1976); *United States* v. *Calvert*, 523 F. 2d 895, 908 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

In the instant case, the issues of innocent state of mind and accident or mistake were clearly raised by petitioner's defense. Throughout the trial, petitioner asserted his complete innocence, maintaining that he conducted his affairs in accordance with governing Medicare regulations and in the belief that his actions were proper. Evidence of his involvement with forged and improperly executed billing documents[7] was highly probative of petitioner's

[7]At trial, the government introduced two Medicare payment request forms, signed "Ernest A. Winkle," relating to X-rays provided by a company designated Integrated Medical X-ray Services. A physician testified that he had refused to sign one of the forms, brought to him by a person named Ernest A. Winkle, because the patient listed on the form was not his (1B Tr. 114-119). The physician's signature on a second form had been forged (1B Tr. 116-117). It was further established through testimony of a former technician of Integrated Medical X-ray Services that during his employment, which ended two months prior to the date the Medicare forms were submitted to a Blue Cross organization, the company was operated by petitioner and handled testing and laboratory work (1B Tr. 124-125).

Petitioner contends (Pet. 16-17) that there was no in-court identification of him as the Ernest A. Winkle involved in the prior transactions and that no one testified that the payment request forms had been processed by a government agency. However, in light of the fact that petitioner's name appeared on the forms, that a doctor recalled that a man with petitioner's name presented the forms, and that the forms were payment claims for laboratory services provided by a firm operated by petitioner, the link between petitioner and the prior transactions was clear and unmistakable. Under Fed. R. Evid. 404(b), evidence of other "wrongs" and "acts," as well as other "crimes," may be introduced when relevant to the state of mind issues in a case. Such questions of admissibility are subject to usual standards of relevance. See, *e.g.*, *United States* v. *Maestas*, 546 F. 2d 1177, 1180-1181 (5th Cir. 1977); *United States* v. *Senak*, 527 F. 2d 129, 143 (7th Cir. 1975).

familiarity with Medicare procedures and his intent to defraud the government. Under such circumstances, the district court did not abuse its discretion in admitting such evidence. See *United States* v. *Chrzanowski*, 502 F. 2d 573, 575-576 (3d Cir. 1974).

Significantly, the trial court instructed the jury that evidence of other acts was only to be considered in connection with the state of mind issue, and could not be considered in determining whether petitioner acted as charged (1B Tr. 135):

> Now, ladies and gentlemen, I instruct you that evidence concerning alleged earlier acts of a like

nature by a defendant may not be considered by you in determining whether the accused committed any act charged in the indictment in this case. You should not consider any such evidence for any purpose whatever unless * * * you first find that the other evidence in the case, standing alone establishes beyond a reasonable doubt that the defendant did this particular act or acts charged in a particular count of the indictment * * *. If you should find beyond a reasonable doubt from the other evidence in the case that said defendant did the act or acts charged in a particular count under deliberation, then you may consider evidence as to alleged earlier acts of a like nature, in determining the state of mind or intent with which the accused did the act charged in a particular count in the indictment * * *.

3. Finally, petitioner contends (Pet. 6-7, 22-23) that the trial court erred in denying his motion for a new trial based on alleged jury impropriety.

The relevant facts are detailed in the opinion of the court of appeals (Pet. App. A-10 to A-11). Petitioner's trial counsel received a post-verdict telephone call from the jury foreman indicating that a juror named Shifler had disclosed to the jury that co-defendant Alan Colmar had entered a guilty plea.[8] Petitioner's counsel, after conferring with petitioner, chose not to reveal this possible impropriety to the trial judge.

Following sentencing, a new defense counsel filed a notice of intention to interview trial jurors to investigate the impropriety. The district court ordered that no

[8]Co-defendant Colmar was present during jury selection. He later pleaded guilty. In accordance with a defense request, the jury was not told of the reason for Colmar's absence when trial commenced.

interviews be conducted and instead convened a post-trial hearing to consider the matter. The jury foreman testified that during deliberations on the conspiracy count of the indictment, a juror named Marjorie Graham told the jury that Colmar had pleaded guilty. The foreman could not recall how Graham had acquired that information. At a supplemental hearing, juror Graham testified that she had "supposed" Colmar pleaded guilty since that would explain his absence after his initial appearance. She had no recollection of Colmar's plea having been discussed either by herself or any other jury member. Based on this testimony, as well as on the "repeated instructions to the jury to avoid extrinsic influences on their deliberations, and the trial counsel's ethical breach both in speaking to the jury foreman and in not reporting the incident to the court," the district court denied petitioner's motion for a new trial (Pet. App. A-11; footnote omitted).

As the court below correctly noted (Pet. App. A-11), the government bears the burden of showing that an accused has not been prejudiced when the jury has been exposed to improper extrinsic influences. Assuming that those influences were present here, the record establishes clearly that petitioner was not prejudiced by the incident. Any possible speculation by a juror about Colmar's guilty plea could only have related to the conspiracy count, as to which Colmar and petitioner were both named as defendants. But the jury did not convict petitioner on the conspiracy count; his convictions rested on substantive counts that were distinct from the conspiracy count involving Colmar. Because petitioner's convictions on the substantive counts were based on documentary and testimonial evidence that the court found to be "not only relatively discrete but damning," it properly concluded that there was no "genuine possibility of prejudice to the defendant in his trial on the substantive counts from the

jury's awareness, with respect to the conspiracy count, that he may have been associated with a criminally tainted individual" (Pet. App. A-12).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

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[9]This case bears no resemblance to *Remmer* v. *United States*, 350 U.S. 377, 381-382 (1956), relied on by petitioner. There, the foreman of the jury had had conversations with a friend of the defendant, who offered a lucrative bribe if the foreman decided the case in favor of the defendant. Under all the circumstances, that massive and criminal intrusion into the jury's deliberations prevented an impartial verdict. The prejudicial potential of the juror's speculations about Colmar's plea is obviously not of the same magnitude.

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